IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.454 OF 2000

Anna Pandurang Avaghade
(Age 22 years,residing
at village Kiraksal,
Tal-Man Dist-Satara,
Presently at Kolhapur Appellant/
Central Prison,Kolhapur) ..Original accused

Versus

The State of Maharashtra
(at the instance of
Dahiwadi Police Station,
Dist-Satara vide C.R.No. Respondents/
41/99, Sessions Case No (Original
162/99) ... Complainant)

Mr.Niranjan Shimpi, Advocate for the Appellant.
Ms. Usha V.Kejriwal, A.P.P. for the State.

CORAM: S.B.MHASE &

S.R.SATHE,JJ.

DATE : 8th June 2005.

ORAL JUDGEMENT (PER S.R.SATHE,J):

1 Appellant/original accused Anna Avaghade in Sessions Case No.162/99 has preferred this Appeal against the Judgement and Order passed by the 5th Additional Sessions Judge, Satara, whereby he was convicted for the offences punishable u/s 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/-,in default to suffer RI for 3 months.

2. Brief facts giving rise to this appeal are as under;

Complainant Vitthal Avaghade (Ex.24) was residing at village Kiraksal alongwith his son Dilip (deceased in the instance case) and his

other family members. Dilip used to play trumpet in a band party known as Jay Malhar Band Party. Accused Anna is cousin brother of Dilip and he also used to play on trumpet in the said band party. On 13/5/1999 the said party was called in the marriage ceremony of one Laxman Kumbhar and on that occasion some dispute had arisen between Anna and deceased Dilip. It was because Anna started singing in the said marriage. Diilip prevented him from singing a song and on that count there was dispute between them.

3 On 18/5/1999 as usual Dilip (deceased) had gone to Mahadeo temple for sleeping. It was usual practise in the said village that some young boys used to sleep during summer in the said temple. Accordingly, on the day of incident Dilip had gone there. Prosecution witness Rajendra Avaghade (EX.27) was also sleeping in the said temple on that day. All of them had gone to sleep at about 10.45 p.m. At about 11.15 p.m. or so, Rajendra heard some noise of falling some article and as a result of the same he awoke. He found that accused Anna

was standing near Dilip Avaghade. Dilip was lying there. Accused Anna lifted a stone which was lying there and threw it on the head of Dilip. As a result of the same Dilip received bleeding injury. Therefore, Rajendra and other 2/3 boys who were also sleeping near Dilip raised shout. Hearing the said shout complainant Vitthal, father of Dilip who was residing at a distance of about 14/15 feet away from the temple, rushed to the temple. He found that Dilip was lying in a pool of blood in unconscious state. Some villagers had gathered there. The villagers were saying that Anna threw a stone on the head of Dilip. Immediately thereafter, some arrangement was made to bring one jeep and Dilip was taken to Gondawale Hospital. After reaching there it was advised to take the injured to Satara. Naturally, he was taken to that place but, there also the doctor advised that the injured should be taken to Krishna Hospital, Karad. Therefore, he was removed to Krishna hospital, Karad. However, unfortunately on the next day early morning, Dilip succumbed to injury sustained by him. Immediately thereafter police were informed

about the same. Karad police reached to the hospital and recorded statement of complainant Vitthal Avaghade. As offence had occurred within the territorial jurisdiction of Dahivadi Police Station, the complaint was forwarded there. On the basis of the said complaint, police registered the crime at C.R. no.41/99 for the offence punishable u/s 302 of the Indian Penal Code . The police then visited the hospital and drew the Inquest Panchnama and sent the dead body for post mortem. The police also drew Panchnama of the place of offence and arrested the accused . After recording the statements of various witnesses , recovering the stone used in the offence and after completing the investigation, police submitted charge-sheet against the accused in the court of J.M.F.C., Dahiwadi.

4. Finding that the accused is chargesheeted for the offence punishable u/s 302 of the Indian Penal Code which is exclusively triable by the the Sessions Court, the Learned J.M.F.C. committed the case to the Sessions Court, Satara.

5. The 5th Additional Sessions Judge, Satara framed charge against accused for the offence punishable u/s 302 of I.P.C. Accused pleaded not guilty and claimed to be tried. His defence was of two fold. Firstly, of total denial and secondly it was contended that the accused was suffering from schizophrenia and in such state of mind he might have committed the alleged act and hence can not be held guilty.

6. In order to bring home the guilt of the accused prosecution examined only 4 witnesses. PW 1 Jaysingh Avaghade (Ex.23); PW 2 Vitthal Krishna Avaghade (Ex.24); PW 3 Rajendra Khashaba Avaghade (Ex.27) and PW 4 Dhondiram Dattu Jadhav (Ex.29) who did the autopsy.

7. After considering the evidence on record, the learned Trial Judge came to the conclusion that the prosecution has proved beyond reasonable doubt that at the relevant time accused threw stone on the head of Dilip and caused death of Dilip. Therefore, the Learned Trial Judge convicted and sentenced the

accused as mentioned above.

8. Being aggrieved by that Order, original accused has filed the present Appeal. In this Appeal Mr. Shimpi, Advocate for the appellant has urged four points. Firstly, he submitted that there was inordinate delay in lodging the FIR. Secondly he argued that the Learned Trial Judge has wrongly relied on sole uncorroborated testimony of Panch Witness Rajendra Avaghade. Thirdly, he submitted that the prosecution has failed to prove motive for the crime. Fourthly, he submitted that the Trial Judge ought to have considered the evidence of the defence witness Dr.Dabholkar who had stated that at the relevant time accused was suffering from paranoid schizophrenia. He,therefore, submitted that the Appeal be allowed and the accused be acquitted.

9. As against this Learned Additional Public Prosecutor supported the Judgement and the Order passed by the Trial Court.

10 The prosecution witness Vitthal Krishna Avaghade (Ex.24) has specifically stated that on

the day of incident when he was sleeping in the house, he heard hue and cry and as a result of the same he rushed towards Mahadeo temple. At that time he found Dilip was lying in a pool of blood and one stone was lying near him. Villagers had gathered there and they were discussing that Anna Avaghade threw stone on the head of Dilip. Prosecution has produced Post Mortem notes at Ex. 30 wherein, the doctor has opined about the cause of death and mentioned external injuries that were found on the person of Dilip (column 17). The doctor has also opined that death was due to depressed skull fracture and fracture of right mastoid bone. If we see the suggestions put to the panch witnesses as well as the statement of the accused recorded u/s 313 of Cr.P.C., it is crystal clear that it is not disputed that on the day of incident Dilip had gone to the temple for sleeping and when complainant Vitthal Avaghade reached there, Dilip was found lying there in a pool of blood. Having regard to this fact, as well as to the nature of injuries sustained by Dilip and the evidence of Dr.Jadhav where he has stated that the injuries found on

the person of deceased Dilip were anti mortem and the same can be caused if the stone is thrown when a person is in lying condition. It is clear that death of Dilip was homicidal.

11. The main question is whether the prosecution has proved beyond reasonable doubt that the said death has been caused at the hands of the accused. In order to prove this, the prosecution is relying on evidence of complainant (Ex.24) and the eye witness Rajendra Avaghade (Ex.27). It is true that Vitthal Avaghade, father of Dilip has filed the present complaint on 20/5/99. The alleged incident had taken place on 18/5/1999 at about 11.45 p.m. So, certainly there is some delay in filing the FIR. It is true that FIR assumes much importance in a trial and if there is delay, there is possibility of embellishment. However, merely because there is delay in filing FIR cannot jump to conclusion that the evidence on record is not true and correct. Ultimately, we have to see whether the delay is properly explained. Under what circumstances the delay has occurred. In this case we find that

immediately after attack deceased was found in an injured condition in the temple. He was taken to Gondawale hospital. From there he was removed to Satara and from there to Karad hospital. Naturally, under such circumstances when the deceased had sustained grievous injuries, it was not possible for his father to go to the Police Station immediately and lodge a complaint. In fact this is a case where alleged incident was not seen by many people and so there was no possibility of others going to the Police Station and lodging complaint. So, merely because father of the deceased has not lodged the complaint on 18th , we cannot jump to the conclusion that he has prepared a cock and bull story and falsely implicated the accused. It is crystal clear that the moment the father of the deceased got some time he lodged the complaint. So, under such circumstances we are not inclined to give any importance to the argument advanced by the learned advocate for defence in this behalf.

12. From the evidence of complainant (Ex.24) it is very clear that he is not an eye witness .

In fact he has admitted that at the relevant time he was not present at the Mahadeo temple and rushed to the temple when he heard hue and cry. So, the prosecution is mainly relying on the evidence of Rajendra Avaghade (Ex.27). While considering his evidence two things must be borne in mind. If we see cross examination of Rajendra Avaghade (Ex.27), it is nowhere suggested to him that at the relevant time he was not present in Mahadeo temple. Secondly, it is also admitted that at the relevant time Dilip was also sleeping in the said temple. It is in fact suggested to Rajendra that ‘‘at the relevant time there was dark in the temple and as a result of the same he could not identify the assailant." It is also suggested to him that as he awoke from sleep he could not identify the assailant. So from this cross examination it is clear that persence of Rajendra Avaghade at the place of offence is not disputed.

13. Rajendra Avaghade (Ex.27) has specifically stated that at the relevant time he heard the noise of falling some article and as a result of the same he awoke. He found that

accused Anna was standing near Dilip. He lifted a stone which was lying there and threw on the head of Dilip. Evidence of Rajendra in this behalf is not at all shaken or shattered in the cross examination. On the contrary the same is also corroborated by the medical evidence. If we see Post Mortem Notes (Ex.30) and in particular the injuries described in column 17, it is very clear that Dilip had sustained as many as 4 injuries. Two were on head and one was on cheek near left eye. Taking advantage of this it was tried to be argued on behalf of the defence that the first hit by stone was not seen by anybody or by Rajendra because he had said that he awoke after hearing the noise and when he saw accused Anna was standing near Dilip. Dilip had sustained injury and in his presence Anna threw big stone on the head of Dilip. However, we cannot ignore a fact that immediately accused picked up a stone and threw it on the head of Dilip. So the fact that Anna threw stone on the head of Dilip is amply proved by the evidence of Rajendra Avaghade.

14. It was argued on behalf of the defence

that there is no corroboration to the evidence of eye witness Rajendra Avaghade(Ex.27). However, it is needless to say that there is no rule of law that conviction can not be based on sole testimony of eye witness. All that is required is to see whether the evidence of sole eye witness is sufficient to build up confidence and whether it appears to be straight forward. In the instant case there is absolutely no reason why Rajendra Avaghade should depose against the accused Anna. It has come on record that Anna, deceased Dilip as well as eye witness Rajendra were friends. They were working in same Jay Malhar Band Party. There is absolutely nothing on record to show that eye witness Rajendra had any special intimacy with deceased Dilip and any grievance or grudge against the accused. When such is the position and there is nothing on record to show that evidence of eye witness Rajendra is not trustworthy, the Trial Judge also rightly accepted sole testimony of Rajendra. In the instant case it is not necessary to find corroboration. There are various authoritative pronouncements wherein, it has been held that even testimony of a single

eye witness can be the basis of conviction provided it is trustworthy and reliable. We think this is the case where evidence of single eye witness Rajendra is quite reliable and trustworthy and the same is corroborated by medical evidence and hence we have no hesitation to accept the same.

15. Learned advocate for the accused vehemently argued before us that the evidence of Rajendra Avaghade can not be accepted because his conduct is unnatural and he has stated that after the incident he went to his house and slept. It is needless to say that merely because particular witness has acted or reacted in a particular manner, we cannot discard his testimony, unless it appears that the said conduct was totally unnatural. In the instant case the act of throwing a stone on the head of Dilip and causing severe injury to the head had occurred in presence of the said witness, so it is but natural that as a result of the same he got scared and preferred to go to his house. Merely because at that stage he reacted in such manner or he did not obstruct the accused or did not

chase him when he ran away from the said place, we cannot jump to conclusion that his testimony is not reliable, particularly when it is crystal clear from the evidence that his presence at the place of incident is not disputed by the defence.

16. It was argued on behalf of the defence that prosecution has failed to prove the motive. For that purpose learned Advocate for defence has drawn our attention to the descripancies in the evidence of complainant Vitthal. he submitted that the said witness had in fact not stated before police about earlier incident dated 13/5/99 and for the first time while in the witness box he deposed that some incident had occurred on 13th and as a result of the same there was some dispute between Dilip and Anna. It is true that in the complaint Ex. 25 complainant had not stated before police about the incident dated 13/5/99. It must be noted that at that time complainant was in fact not knowing as to who exactly assaulted Dilip. No doubt there was some talk in the crowd that Anna threw a stone on the head of Dilip. But at that

juncture, there was no necessity for the complainant to narrate about earlier incident which had taken place on 13/5/99 because that was not grave incident in which Anna had given any threat to Dilip. So, merely because earlier incident of 13/5/99 was not mentioned in FIR (Ex.25), we can not jump to the conclusion that evidence given by complainant is not true and correct. On the contrary if we see the evidence of Rajendra then also we find that he has also stated about earlier incident dated 13/5/99. So, non mention of the said incident in FIR would not make any difference. Besides this even if we assume for the sake of argument that the prosecution has failed to adduce any sufficient evidence to show that there was particular motive to kill Dilip, still then that will not change the fate of this case. It is well settled that where there is sufficient ocular evidence to prove the guilt of accused, the motive assumes no importance. If any authority is needed for this proposition, it is **Gurcharan Singh and another Vs.State of Punjab (A.I.R. 1956 S.C.460).** So merely because the prosecution has not proved the motive, it can

not be said that the prosecution has failed to prove the charge levelled against the accused. The learned advocate for the accused has drawn our attention to the evidence of DW 1 (Ex.36) Dr.Prasanna D.Dabholkar. From the perusal of his evidence it appears that accused was treated by him for some time. He has also admitted that prescriptions produced by the accused were given by him. On the basis of the said prescriptions it was argued that medicines prescribed for the said patient were in connection with ‘‘schizophrenia’’. However, if we closely peruse the evidence of Dr. Dabholkar, we find that he has not produced the case papers nor he has stated that when he examined the accused and he found particular abnormality in him. In other words his clinical findings have not been recorded anywhere. At least there is no evidence in that behalf before Court. More over there is no evidence to show that just before the incident or immediately after the incident accused Anna was treated by the doctor in respect of ‘‘schizophrenia’’. So as it is, the evidence that has been adduced by defence is very scanty and vague and the same is not

sufficient to come to conclusion that at the relevant time accused was suffering from ‘‘schizophrenia’’ attack and in the condition of such attack he did the above mentioned alleged act. Considering such state of defence evidence, the Trial Judge has rightly refused the defence version that at the relevant time accused was insane.

17. Much is made about the fact that prosecution has not examined the Investigating Officer and not brought sufficient evidence to prove the weapon (in the instant case stone) used for commission of offence. It is true that prosecution has not examined the Investigating Officer. Of course from the material on record it appears that at times prosecution had infact submitted an application to examine the Investigating Officer. But for some reason or other, he was not examined and finally when application was submitted seeking time to examine the Investigating Officer, the same was rejected. Similarly, though, prosecution examined Jaysingh Avaghade (Ex.23) to prove the panchnama of the place of offence. He has not

supported the prosecution. So prosecution could not adduce sufficient evidence to show that stone before the Court is the same with which the accused assaulted Dilip. However, merely because prosecution has failed to adduce evidence in this behalf and IO is not examined, it cannot be said that whatever evidence is available on record is not sufficient or that non examination of IO creates any doubt about the prosecution version. There is nothing to show that non examination of the Investigating Officer has caused any prejudice to the accused. Admittedly there are no omissions and contradictions in the evidence of eye witness Rajendra. So under such circumstances we are not inclined to accept the argument advanced by the learned advocate in this behalf.

18. Thus, from the evidence on record, it is very clear that the prosecution has adduced cogent, consistent and convincing evidence to prove that at the relevant time accused Anna threw stone on the head of Dilip and thereby caused his death. Finding recorded by the Learned Trial Judge is legal and correct and

there is no necessity to interfere with the same. In view of this, the Appeal is dismissed. Order of conviction and sentence passed by the Learned 5th Additional Sessions Judge, Satara is confirmed.

(S.R.SATHE) (S.B.MHASE)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.454 OF 2000

Date of decision : 8th June 2005.

For approval and signature:

THE HON’BLE SHRI JUSTICE S.B.MHASE

THE HON’BLE SHRI JUSTICE S.R.SATHE

1. Whether reporters of local papers may be allowed to see the Judgement?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the judgement should be sent to Nagpur & Aurangabad office?